Emerging Voices: Is the Margin of Appreciation Accorded to European Union Member States Too Wide, Permitting Violations of International Law?

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Jenny Poon

[Jenny Poon is a Doctoral Candidate at the Faculty of Law of Western University, Canada and a Barrister & Solicitor in Ontario, Canada. The topic addressed in this post is based on a paper entitled State Discretion on Asylum Claims Procedures: Violation or Adherence to Non-Refoulement? *All websites were accessed on 22 July 2016. The author would like to thank Dr. Valerie Oosterveld for reviewing an earlier draft.]*

Introduction

The margin of appreciation is a creation of the European Court of Human Rights (ECtHR), in which the ECtHR grants European Union (EU) member states deference when the national authorities use their discretion to carry out duties under international law, which, it is argued, may at times be accorded so widely, that the margin of appreciation may permit member states to derogate from their international law obligations. The idea that the margin of appreciation is not yet a settled area of the law is reiterated by Greer in his paper. The doctrine first appeared in the ECtHR's jurisprudence in the case of *Cyprus Case (Greece v. the United Kingdom)*. Despite having an established presence in the jurisprudence of international tribunals, the extent of the doctrine is nonetheless uncertain as argued by Shany in his paper. For instance, international courts and tribunals have issued conflicting decisions on the use of the margin of appreciation. Most notably, the ECtHR applied the doctrine in the *Handyside* decision, stating that the doctrine applies to domestic legislators and to judicial bodies, while World Trade Organization (WTO) Dispute Settlement Body and its Appellate Body has stated in the *Asbestos* case that the doctrine applies only to WTO members. In the former case, both domestic legislators and judicial bodies are given a margin of appreciation when applying the law, while in the latter case, only national authorities of WTO member states are given a margin of appreciation when making discretionary determinations.

Despite the law being unsettled with regards to margin of appreciation, this doctrine is nonetheless applied by the ECtHR to show deference to EU member states when the member states use their discretion to carry out international law obligations. Consequently, this interpretation of the margin of appreciation permits the violation of international law in the context of asylum, where it allows EU member states to derogate from their duties of ensuring procedural safeguards, creates multiple and thus inconsistent interpretations, and permits state interests to be placed above the interests of asylum claimants. Clarity in the law is therefore warranted with regards to defining the extent to which "margin of appreciation" applies, and where the line must be drawn to ensure that the vulnerabilities of asylum claimants are properly addressed.

A wide margin of appreciation permits violation of international law

The first argument I wish to make is that a wide margin of appreciation permits EU member states to derogate from their duties of ensuring sufficient procedural safeguards for asylum claimants. International law obligates States to adhere to the procedural safeguards including according asylum claimants with the opportunity to be heard and the right to appeal in the context of an expulsion order pursuant to Article 32(2) and 32(3) of the Refugee Convention. Procedural safeguards come in many forms, which can include the safeguard to ensure that asylum applications are examined for their merits and not permitting instances of bias to affect the decision-making process. This is illustrated in the case of *OS v. Ministry of Interior*, where the Supreme Administrative Court of the Czech Republic held that the Ministry of the Interior erred in basing its asylum decision to reject an application on an inaccurate assessment of Turkey, thus giving effect to biased decision-making. The Ministry had exercised its margin of appreciation by basing its decision on a biased country of origin report. Having based its decision on a report that was political and that was not an accurate assessment of Turkey at the time, the Ministry of the Interior had biased decision-making. This case demonstrates that a wide margin of appreciation enables the EU member state to derogate from its international duty of ensuring procedural safeguards for asylum claimants, thus violating international law.

Next, I argue that a wide margin of appreciation permits EU member states to create multiple and thus inconsistent interpretations, leading to inconsistency and unpredictability of the law.

When States exercise their margin of appreciation too widely, it permits the creation of multiple and thus inconsistent interpretations of their international law obligations. The ECtHR case of *Hirsi Jamaa and Others v. Italy* illustrate the differences in interpretation among EU member states on their duties under international law. The ECtHR held that differences in interpretation on asylum decisions can result where there are bilateral treaties signed between the first and subsequent asylum-receiving EU member states. This case illustrates that a wide margin of appreciation permits EU member states to interpret their international law obligations differently. While differences in interpretation may be warranted in some circumstances, such as to accommodate for the unique geopolitical circumstances of different EU member states, if the margin of appreciation is too wide and thus improper, it creates too much room for EU member states to interpret their international law obligations, and result in a divergence among EU member states so wide that would not justify the doctrine's original purpose. Another problem with a wide margin of appreciation is that it may lead to an increased likelihood of multiple and thus inconsistent interpretations, which may increase the possibility of international law being violated by EU member states.

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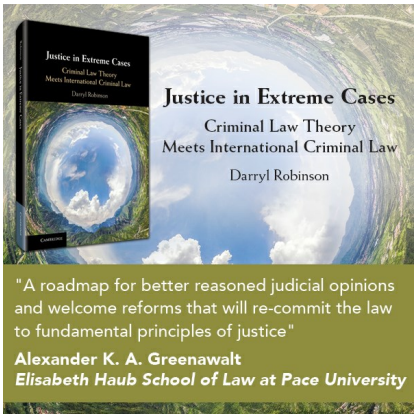
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Finally, I end with the proposition that a wide margin of appreciation permits EU member states to place their state interests above the interests of asylum claimants. EU member states exercise their margin of appreciation when they process asylum applications based on discretion which sometimes entails political considerations rather than merits. An example can be taken from the case of *Ireland v. The United Kingdom*, in which the ECtHR held that "national authorities are in principle in a better position than the international judge to decide [on the derogation from Article 15 of the *European Convention on Human Rights*...]. In this matter Art 15(1) leaves the authorities a wide margin of appreciation". This case is used as an example to illustrate that the margin of appreciation may be accorded too widely in the case of derogation in times of emergency (Article 15), which, when the derogation is based solely upon political criteria, may permit EU member states to violate international law. For example, depending on the political agenda at the time, the EU member state may choose to interpret its duty to process asylum applications either narrowly or broadly, according to state interests at the time, leading to uncertainty and unpredictability of the law for asylum claimants. The case demonstrates that where the margin of appreciation accorded to an EU member state is too wide, the member state may utilize the doctrine to their advantage to promote their political agendas, often at the expense of asylum claimants. This motivation to accomplish state-interested goals permits the violation of international law in instances where interests of the EU member state are placed above the interests of the asylum claimant. It is argued that a wide margin of appreciation allows the EU member state to misuse the doctrine to circumvent their international law obligations. While some may argue that a flexible margin of appreciation would encourage the EU member state to sign on and support the norm, the concern is that, too much flexibility and therefore a margin of appreciation that is accorded too widely, would be detrimental to the asylum claimant given that a well-resourced member state may trump individual rights at any time where it would be in the member state's interest to do so.

Conclusion

The purpose of this post is to consider the effects of the margin of appreciation doctrine in the context of asylum, where at times this can result in EU member states circumventing their international law obligations. I hope that illustrating the doctrine in this context can encourage the debate on proposing solutions for this perceived problem. It is important that the rights of the vulnerable such as asylum claimants are safeguarded against well-resourced mighty State powers. Therefore, the proper application of the margin of appreciation needs to be clarified in order to avoid EU member states acting outside of the permitted boundaries of the margin of appreciation at the expense of the asylum claimants. One proposed solution is to enlarge the role of the ECtHR to better define what constitutes 'margin of appreciation' and construct a framework within which EU member states may operate, while safeguarding the rights of the vulnerable.

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Congratulations on this, Jenny. Very interesting, particularly in the context of the Brexit debates about immigration / asylum / free movement.

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Response...

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James A. Sweeney

This is an interesting post, in two areas that really interest me: the ECtHR margin of appreciation doctrine and refugee law. However, the post currently refers to the EU when it means the Council of Europe (i.e. the European Court of Human Rights is not an institution of the EU; and whilst all members of EU are members of Council of Europe, not all members of the Council of Europe are members of the EU). To complicate matters further, the ECtHR has reviewed its Contracting Parties' behaviour when they have purported to implement EU law (such as in respect of the EU's Common European Asylum System). The ECtHR can't currently review the EU or its laws directly, but merely because a State's action is apparently permitted in EU law does not make it immune from scrutiny by

the ECtHR. Note also that there are ongoing negotiations on the EU becoming a signatory to the ECHR in its own right. I've written a fair bit on the margin of appreciation, including on the margin of appreciation in the ECtHR compared to its use by the Court of Justice of the EU, if that helps: http://www.research.lancs.ac.uk/portal/en/publications/a-margin-of-appreciation-in-the-internal-market(556c86de-7c1d-4460-ad3b-19bcdaa6111b).html One of my own PhD students...

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Johannes Hendrik Fahner

Dear Jenny, Thank you for your interesting post. I think you rightly identify various problems inherent in the ECtHR's MoA doctrine. It is commonly believed, however, that the Court does not apply the MoA in the context of Article 3, but instead exercises 'rigorous' review, because this Article poses absolute obligations unlike the more flexible obligations of Articles 8-11 (see e.g. Chahal v UK, para 80-82, 96).

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